IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 21, 2001

STATE OF TENNESSEE v. RICKY FRANKLIN YORK

Appeal from the Criminal Court for Sumner County
No. 273-2000 Jane W. Wheatcraft, Judge

No. M2001-00093-CCA-R3-CD - Filed October 17, 2001

The defendant, Ricky Franklin York, appeals from his sentence of six years as a Range I, standard offender that he received upon his guilty plea to aggravated assault, a Class C felony. He contends that the trial court erred by enhancing his sentence based upon enhancement factors contained in Tenn. Code Ann. § 40-35-114(10) and (16), which he claims are inapplicable. Although we conclude that the facts do not justify application of factors (10) and (16), we affirm the sentence.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

David Allen Doyle, District Public Defender, for the appellant, Ricky Franklin York.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's assaulting his father, Gary York, who had physically disciplined the defendant's young son. Because of drug abuse by the defendant and his wife, the defendant's parents obtained custody of their three minor children, which they ultimately shared equally with the children's maternal grandparents. In late 1999, the defendant and his wife separated, and he moved in with his parents.

On February 9, 2000, the defendant learned that his father had hit his youngest child on the back with a switch. The defendant became angry and began a fight with his father. He got his father to the floor and kept hitting him. The defendant's mother tried to stop the defendant and hit him on the head and back with a stick, similar to a broom handle. The defendant pushed her away and continued to hit his father. The defendant's father died on the floor.

The defendant was originally charged with second degree murder. However, the pathologist who performed the autopsy concluded that death was caused by hypertensive cardiovascular disease. His report states that the victim "died as the result of hypertension ("high blood pressure"), with associated arteriosclerosis ("hardening of the arteries"), acute and chronic ethanolism, micronodular cirrhosis of the liver, and pulmonary emphysema. The blood alcohol level is 0.25 gram % ethyl alcohol, a level which can be in and of itself fatal." Although the doctor reported a "plethora" of head, neck, and shoulder cuts and bruises, he did not relate any of the injuries to the victim's cause of death. The grand jury returned an indictment for aggravated assault by causing serious bodily injury.

The record reflects that while the defendant was on bail in this case, his mother reported to the police that the defendant argued with her regarding discipline. Mrs. York attempted to call her brother during the argument, but the defendant grabbed the telephone and ripped the cord from the wall. She told the police that this was not the first time that the defendant had become violent with her and had broken things inside the residence. She said that the defendant had never hit her but that he had threatened to harm her. She said that she feared for her safety.

Also while on bond, the defendant was charged with assaulting his in-laws' eight-year-old neighbor. The defendant claimed that the boy had taken his own son's ball and was playing with it. The defendant ran into the boy's yard, knocked him down, and took the ball. The defendant told the boy that he would rip his "g-d head off next time." The defendant pled guilty to this assault at the same time he pled guilty to the aggravated assault in this case.

The defendant was convicted of assault in 1996 and of possession of cocaine and carrying a weapon in 1992. Although the defendant's father-in-law testified at the sentencing hearing that he would accept the defendant into his home and thought the defendant should be allowed to stay with his children, he acknowledged that the defendant had lost his temper once and grabbed him by the throat. The defendant's mother testified that she was not afraid of her son, although she admitted that he needed anger management classes.

The trial court found that the defendant had a prior history of criminal convictions and behavior, that he had no hesitation about committing a crime when the risk to human life was high, and that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. See Tenn. Code Ann. § 40-35-114(1), (10), (16). The defendant contends that factors (10) and (16) are inherent in the crime of aggravated assault by causing serious bodily injury. He cites no authority to support his contention. The state responds that both factors (10) and (16) may be used to enhance the defendant's sentence for aggravated assault by serious bodily injury. It cites State v. Jones, 883 S.W.2d 597, 602-03 (Tenn. 1994), in which our supreme court concluded that the risk to human life being high and the great potential for bodily injury are not inherently included in aggravated assault based upon serious bodily injury. We note, though, that the supreme court did not apply the factors in Jones because the circumstances did not justify their application. We have a similar view in the present case. First, we bear in mind that the record is devoid of any evidence that the defendant's conduct contributed to the victim's death, and we are loath to turn our

suspicions of causation into findings. In this respect, although the defendant administered a serious beating to his father, we do not believe it presented a high risk of death as contemplated by factor (10). Likewise, we believe that the facts in this case reflect that the evidence of the assault against the victim is the same as that needed to show the application of factor (16). "The facts do not demonstrate a culpability distinct from and appreciably greater than that incident to the offense for which he was convicted." Jones, 883 S.W.2d at 603. Thus, factor (16) does not apply relative to the victim.

The state also asserts that factors (10) and (16) may apply when the defendant places people other than the particular victim at high risk of death. See Jones, 883 S.W.2d at 603 (holding that factor (10) applies when others are put at high risk). In this respect, it also recognizes that this court is split as to whether factor (16) may be applied when great potential for bodily injury exists for a person other than the named victim. See, e.g., State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995) (limiting factor (16) to the person who was the victim of the crime charged); State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995) (holding that factor (16) applies when persons other than the victim of the crime committed are in the realm of danger); State v. Sean Imfeld, No. E2000-00094-CCA-R3-CD, Knox County (Tenn. Crim. App. Feb. 27, 2001) app. granted (Tenn. July 2, 2001) (majority of panel relying on Sims to apply factor (16)); State v. John Bradley Lowery, No. E1998-00034-CCA-R3-CD, Knox County (Tenn. Crim. App. June 12, 2000) app. denied (Tenn. Feb. 20, 2001) (majority of panel relying on Bingham to limit application of factor (16)); State v. Eunyce Marie Saunders, No. E1998-00230-CCA-R3-CD, Sullivan County (Tenn. Crim. App. June 8, 2000) (majority applying factor (16) to person other than victim of crime charged); State v. Terrence T. Wiggins, No. 01C01-9806-CR-00241, Davidson County (Tenn. Crim. App. July 1, 1999) (majority of panel holding that Sims allows factor (16) to apply to persons in the zone of danger); State v. Charles Justin Osborne, No. 01C01-9806-CC-00246, Perry County (Tenn. Crim. App. May 12, 1999) (relying on Bingham to limit application of factor (16)). We note that this issue is presently before our supreme court in Imfeld.

We do not believe, though, that we need to resolve the split in interpretation of factor (16) in this case. First, we do not believe that sufficient evidence exists in the record to support factors (10) and (16) relative to persons other than the defendant's father, the victim of the assault. The record reflects that the prosecutor did not assert the application of these two factors and that the trial court applied them without providing any explanation of the facts found by it to justify their application. On appeal, the state relies upon testimony by the defendant's mother regarding his three children, who were seven, four and three years of age, being in the same room with the defendant and the victim when the altercation began. She also testified that the children were "running around, crying [and] screaming."

With the defendant and the victim fighting with each other, we do not believe that the children's presence in the room when the fighting started and running around crying warrant determinations that the defendant had no hesitation about committing a crime when the risk to his children's lives was high and that there was great potential for bodily injury to them. The record

does not indicate any risk of bodily harm to the children and we will not assume it from their mere presence and upset condition.

Second, we believe that the defendant's criminal history justifies his maximum sentence for a Range I, standard offender when viewed in the context of the circumstances surrounding the aggravated assault. The record reflects that the defendant has a history of violence or threatening violence based upon his lack of anger management. The fact that several incidents occurred after the defendant was on bail for the present offense reflects the defendant's inability to refrain from such conduct. In this respect, this pattern of conduct similar to the present offense weighs heavily in considering appropriate punishment. We believe it supports the defendant's six-year sentence.

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

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JOSEPH M. TIPTON, JUDGE